**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**MARSHALL DIVISION**

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| **FUNCTION MEDIA, L.L.C.,** | § | |
| | § | |
| **Plaintiff,** | § | **Civil Action No. 2007-CV-279** |
| | § | |
| **vs.** | § | |
| | § | |
| **GOOGLE, INC. AND YAHOO, INC.,** | § | |
| | § | |
| **Defendants.** | § | **JURY TRIAL DEMANDED** |

**PLAINTIFF'S SUR-REPLY TO GOOGLE'S REPLY IN SUPPORT OF THEIR MOTION TO LIMIT THE NUMBER OF ASSERTED CLAIMS**

FM has three simple points to make in surreply to Google's motion to limit FM's claims at trial.

First, the Eastern District authority Google attaches to its reply brief curiously contradicts Google's own point. This Court's order in *Crane Co. v. Sandenvendo Am., Inc.*, No. 2:07-CV-042 (Ex. A to Google's Reply), limited the plaintiff to 50 claims per defendant, far more than the 18 claims being asserted by FM here. Likewise, Judge Folsom's order in *Data Treasury Corp. v. Wells Fargo & Co.*, No. 2:06-CV-072 (Ex. B to Google's Reply), limited the plaintiff to 50 total claims, and no more than 18 against any group of defendants. Google has certainly located caselaw about the general issue of a plaintiff's asserting too many claims, but its authority does not support its contention that FM's 18 asserted claims are excessive. Indeed, despite FM's invitation to do so in its opposition brief, Google fails in reply to point out anything about FM's 18 asserted claims specifically that make them particularly burdensome to try as a group. Google's insistence upon just 5 claims is simply arbitrary.

Second, Google's outright refusal itself to be limited to four prior art references (Google Reply, at 3 n.3) calls into question the credibility of its supposed concerns about trial efficiency. If anything, one additional prior art reference requires more time and attention at trial than one additional claim, given that the claims tend to share the same general characteristics whereas prior art references each look completely different. Yet, despite claiming that FM's 18 claims will cause all sorts of trial management concerns, Google hedges as to its prior art, offering only that it might voluntarily drop references if FM were limited to 5 claims. Google's bid to limit FM's asserted claims is therefore simply a transparent effort to limit Google's liability, not an attempt to promote judicial efficiency.

Third, Google labels as "outrageous" FM's demand for separate trials for its 18 claims, if it is limited in the first trial to just 5 claims. But in attempting to rebut FM's demand, Google cites caselaw for the proposition that due process permits a plaintiff's claims to be limited if the plaintiff's asserted claims are duplicative. *See In re Katz Interactive Call Processing Patent Litig.*, No. 2:07-ml-01816-RGK-FFM (Ex. C to Google's Reply), at 3 ("By providing examples and pointing out the common genealogy of [plaintiff's] patents and numerous terminal disclaimers, the defendants make a convincing showing that many of the claims are duplicative."). Here, Google has made no attempt to analyze the 18 claims asserted by FM to show that FM pursues duplicative relief. To summarily dismiss FM's due process rights as to duly-issued patent claims surely requires more.

This Court should therefore deny Google's motion.

Respectfully submitted,

/s/ Joseph S. Grinstein

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## CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2009, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

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